

Altoona Q. M. Co. v. Integral Q. M. Co. (Cal.) 45 Pac. 1047, 1049, is cited by respondents as establishing the proposition that:

"If there was only the naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine, in the sense of the statute."

It is shown, however, that the complainant performed the necessary amount of work in 1895. The presence of the watchman shows, or tends to show, the actual possession of the ground by complainant, and that such possession was open and notorious.

These results, as to the acts of the complainant and its good faith with reference to its ownership of the ground embraced in the Cummings claim, taken in connection with all the circumstances under which respondents Bell and Benham took the lease, coupled, as it must be, with the further condition that, while working under the lease as tenants of complainant, they discovered the ore body in dispute, lead to the conclusion that complainant has established a better right and superior title to the mining ground in question than the respondents. But the judgment in this case need not be based solely upon this ground. The same result would probably be reached upon the theory that there is but one vein or lode within the Justice or Woodville patented lines, and that the ore extracted by the respondents was from that lode. But, be that as it may, after a careful review and consideration of all the evidence, I am clearly of opinion that the decided weight and preponderance of evidence upon the facts, shown by the developments as made in the Steele shaft and the Hills or Barclay shaft, with the different levels, tunnels, drifts, and inclines connected therewith, is to the effect that the ore body, seam, or vein disclosed in respondents' workings is a part of, and is connected in vein matter with, the Justice lode, having its apex within the patented lines of the Justice. Let a decree be drawn in favor of complainant, in accordance with the views herein expressed.

A. J. WHITE, Limited, v. PEASE et al.

(Circuit Court, S. D. New York. September 24, 1897.)

LIBEL—BILL OF PARTICULARS.

In an action for libel, where it is plain that plaintiff has no intention of contending at the trial that every assertion contained in each of several alleged libels is false, he should be required to set forth, by bill of particulars, what portions are claimed to be libelous and false.

Action for libel by A. J. White, Limited, against George C. Pease, Robert G. Eccles, and others. Motion by defendants to require plaintiff to make complaint more definite.

Charles De Hart Brower, for the motion.
Townsend, Dyett & Levy, opposed.

LACOMBE, Circuit Judge. The complaint is sufficiently definite and certain to enable defendants to answer. It is perfectly plain, however, that plaintiff has not the remotest intention of contending at

the trial that every assertion contained in each of the alleged libels is false, and proper practice should require it to set forth in some way what portions are claimed to be libelous and false. The proper way to do this is by a bill of particulars, and there is no reason why there should be a second motion and a second argument to determine what such bill should contain. An order may be taken requiring the filing of a bill of particulars showing (1) in what particulars the publication set forth in folios 12 to 21 is alleged to be false; (2) in what newspapers, journals, magazines, circulars, and gazettes the "other false and malicious articles substantially similar," etc., as set forth in folio 23, were published, giving the text of such articles, or of so much thereof as plaintiff complains of, and like particulars as to the newspapers referred to in folio 27; (3) setting forth the analysis made by Charles T. F. Fennel (referred to in folio 24), and indicating in what respects it is contended that it was false. When such a bill of particulars is filed, the precise issues will be sufficiently defined to enable defendants to answer and to prepare for trial, without requiring any repetition of the particulars as prayed for. In all other respects the motion is denied.

UNITED STATES *ex rel.* INTERSTATE COMMERCE COMMISSION *v.*
SEABOARD RY. CO.

(Circuit Court, S. D. Alabama. July 2, 1897.)

No. 203.

CARRIERS—INTERSTATE COMMERCE—COMMON ARRANGEMENT FOR CONTINUOUS CARRIAGE.

The shipment of freight over a number of lines of railroad from a point in one state to a point in another, at a through rate of charges, under an agreement, express or implied, for a conventional division of the charges among the different roads, constitutes a "common arrangement for a continuous carriage or shipment," within the meaning of the interstate commerce act, and a road participating in such arrangement is subject to the provisions of the act, though its line lies entirely within one state, and its part of the joint charge is its regular local rate.

Jos. N. Miller, Dist. Atty., for the United States.

E. L. Russell, for defendant.

TOULMIN, District Judge. The question to be considered in this case is whether the defendant, in transporting property from Fairford, in the state of Alabama, to Chicago, in the state of Illinois, and in transporting goods from Cincinnati, in the state of Ohio, to Fairford, is engaged in such transportation, under a "common arrangement for a continuous carriage or shipment," within the meaning of that language, as used in the act to regulate commerce. The defendant claims that it is not engaged in interstate traffic; that the freight charge from Fairford to Chicago and from Cincinnati to Fairford is made up of a joint rate between Calvert, in the state of Alabama, and Chicago, and between Cincinnati and Calvert, and the regular local rate between Calvert and Fairford; and, as the amount

of the said regular local rate goes to it (the defendant), such a method of carrying freight between the points named and of apportioning the money earned is not a transportation of property between those points "under a common arrangement for a continuous carriage or shipment." In other words, it is contended that, as the Seaboard Railway Company is a corporation of the state of Alabama, and as its road lies wholly within that state, and as it exacts and receives its regular local rate for the transportation from Fairford to Calvert and from Calvert to Fairford, it is not, as to freight so carried, within the scope of the act of congress to regulate commerce.

The supreme court, in the case of Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 193, 16 Sup. Ct. 704. held that:

"When goods shipped under a through bill of lading from a point in one state to a point in another are received in transit by a state common carrier under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce."

—And said:

"When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

In the case cited there was a through bill of lading. In the case now under consideration there is no evidence of a through bill of lading. But for that fact, the two cases would be almost identical. The supreme court, however, say that they must not be understood to imply that a "common arrangement" might not be otherwise manifested than by a through bill of lading. Of course, it may be shown by an express agreement to that effect. In this case there is no evidence of any express agreement. But I think such an arrangement may be manifested by circumstances, such, for instance, as when a carrier, in the usual course of business, enters into the carriage of foreign freight by agreeing to receive and ship goods from a point in one state to a point in another, and to participate in through rates and charges, under a conventional division of the same; that is, a division of the same, expressly or impliedly agreed to. The supreme court, in the case cited supra, in effect held that, when a railroad enters into the carriage of foreign freight by agreeing to receive and ship goods from a point in one state to a point in another, and to participate in through rates and charges, it thereby becomes part of a continuous line, made by an arrangement for the continuous carriage or shipment from the one point to the other, and becomes amenable to the act in relation to interstate commerce. This declaration of the supreme court, it seems to me, clearly shows that the "common arrangement" referred to is implied from the circumstances stated. In that case the court held that a through bill of lading and a conventional division of the charges manifested a common arrangement, and that, although one of the lines of railroad used was a state common carrier, with its line wholly within the

state, and its part of the charges was the regular local rate between two points within the state, it was subject to the interstate commerce act. The facts of that case were that goods were shipped from Cincinnati, Ohio, to Social Circle, Ga., a station on the Georgia Railroad. The initial carrier at Cincinnati issued through bills of lading, and quoted through rates. Said rates were arrived at by adding to the rates from Cincinnati to Atlanta the full local rates of the Georgia Railroad from Atlanta to Social Circle. The Georgia road received the goods at Atlanta, and transported them continuously to Social Circle, but it demanded and collected its full rates from Atlanta to Social Circle. The United States circuit court of appeals and the supreme court held that the Georgia road was amenable to the interstate commerce act.

The facts of the case under consideration are that the defendant received at Fairford, a station on its line, lumber by car loads destined for Chicago, which was shipped over its road to Calvert, a station on the Mobile & Birmingham Railroad, and a point where the two roads cross; that the railroad agent at Calvert was the common agent of the two roads at that point; that he issued freight waybills over the Mobile & Birmingham road from Calvert to Chicago, via Mobile, whence the shipment in the same cars continued over the Louisville & Nashville Railroad and other lines in succession to Chicago. The waybills contained the name of the shipper and of Fairford, the place of shipment, and also the name of the consignee, and of Chicago, the place of destination. There was a joint freight tariff on lumber in car loads from Fairford, Ala., to Chicago, Ill., expressly agreed to or concurred in, in writing, by all railroad lines over which the shipments were made, except by the defendant. There was no evidence that the defendant expressly agreed to the tariff, but that it received and receipted for its part of the through freight as the same was provided for in the tariff, its portion being $1\frac{2}{3}$, which was equivalent to its regular local rate between Fairford and Calvert. The freight was paid to the terminal road at Chicago, and by it transmitted through the several intervening roads to the defendant, the initial road; each road, as is usual in such cases, retaining its part, and paying the balance over to the preceding road in the line of transportation; the defendant receiving its part of said freight from the Mobile & Birmingham Railroad. The facts also are that, in the usual course of business, goods are shipped from Cincinnati to Fairford over the Louisville & Nashville Railroad, consigned to Fairford, with waybill to Mobile, and by continuous shipment from there to Calvert over the Mobile & Birmingham Railroad, and thence by continuous shipment to Fairford, where the freight is collected by the defendant, its part retained, and the balance transmitted to the other railroads in the line in the usual course. My opinion is that the facts of this case manifest a common arrangement for a continuous carriage or shipment of property from one state to another state of the United States, in contemplation of the act to regulate commerce, as the same is construed by the supreme court of the United States. Interstate Commerce Commission v. Detroit, G. H. & M. Ry. Co. (U. S. Sup. Ct. decision, May 24,

1897) 17 Sup. Ct. 986. I am therefore constrained to grant the prayer of the petitioner, and to order the writ of mandamus to issue as prayed for; and it is so ordered.

THE ISAAC REED.

MONTAGUE et al. v. THE ISAAC REED.

(District Court, N. D. California. August 31, 1897.)

No. 10,906.

1. CARRIERS—BILL OF LADING—BURDEN OF PROOF.

Where the bill of lading under which merchandise is shipped exempts the carrier from liability for damage to the goods "if properly stowed," if the goods are damaged the burden of proving proper stowage is on the carrier.

2. SAME—ACTION FOR NEGLIGENT STOWAGE—DEGREE OF CARE.

In an action to recover for damage to range boilers because of negligent stowage, where the evidence shows that the boilers were stowed in the customary way, and according to the best judgment of experienced stevedores, the fact that if they had been put in crates, or several of them lashed together, the injury sustained might have been avoided, does not make the carrier liable, as he was not required to take such extraordinary precautions.

C. M. Jennings, for libelant.

Andros & Frank, for respondent.

DE HAVEN, District Judge. This is an action to recover damages on account of sundry range boilers and small articles of hardware shipped by the libelant at the port of New York on board the ship Isaac Reed, for carriage to San Francisco, and which the libelant alleges were crushed and broken during such voyage solely by reason of negligent and improper stowage. The bill of lading under which the merchandise was shipped contained this clause: "Vessel not accountable for breakage, chipping, chafing, leakage, rust, or numbers, or for splits or stains in plank, if properly stowed." Under such a contract of carriage, when the goods are damaged, the burden to prove and show proper stowage is on the carrier (*Edwards v. The Cahala*, 14 La. Ann. 224), and when the carrier has proved proper stowage such a contract exempts him from liability on account of breakage or on account of the other enumerated causes, unless the shipper shall show that the damage might have been avoided by reasonable care upon the part of the carrier. In other words, under such a contract, when the carrier has shown proper stowage, the burden of proof is then cast upon the shipper to show that his goods were damaged by reason of the carrier's negligence; and without proof of such negligence the shipper is not entitled to recover.

The only evidence in this case as to the manner in which the libelant's merchandise was stowed was produced by the claimants, and is contained in the depositions of the master and the first officer of the vessel; and, as each supports the other, a very general summary of the testimony of the first officer is all that need be given here. He testified, in substance, that he had followed the occupation of a